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厦门大学

博士学位论文

《劳动合同法》有效性研究

A Study of the Validity of Labor Contract Law

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内 容 摘 要

劳动关系是社会化生产方式下最重要的一种社会关系，构建和发展和谐稳定的劳动关系是建设和谐社会的重要组成部分，劳动关系的和谐稳定与否，直接关系到整个社会的稳定程度和经济的发展进程。综观改革开放三十年，我国经历着从计划经济体制向市场经济体制转型的重大变革，引发了劳动关系领域的巨大变化。一方面，我国正处于“黄金发展期”，经济水平持续高速增长，创造了西方经济学理论无法解释的“中国奇迹”和令世界大为惊叹的“中国效率”；另一方面，我国又处于“矛盾凸显期”，在劳动关系领域，劳动争议案件和因劳动纠纷引发的群体性事件呈现出不断上升的趋势，拖欠工资、矿难频发、劳动者的法定权利长期得不到制度性的有效保障等不和谐的现象和不稳定的因素令人堪忧，劳资关系问题已经成为当今最广泛引起关注的社会问题之一。在此情况下，为了明确用人单位和劳动者双方的权利义务，保护劳动者的合法权益，构建和发展和谐稳定的劳动关系，《中华人民共和国劳动合同法》自 2008 年 1 月 1 日起实施。

围绕《劳动合同法》产生的各种争论和《劳动合同法》实施前后引发的种种现象，引起了笔者的兴趣和思考。这部在审议、通过、生效和实施的过程中一直极富争议的法律是“良法”还是“恶法”？《劳动合同法》的实施效果为什么会与立法者的立法目的相距甚远，并且在现实生活中遭遇到巨大的挑战和强烈的质疑？如何对其法律效果和影响进行全面、客观地衡量和评价？面对以上诸多问题和疑惑，实质上是要回答《劳动合同法》的效力和实效如何？换言之，也即是要回答《劳动合同法》的有效性如何？出于以上思考，笔者试图梳理法有效性的一般理论，在此基础上确立法有效性的衡量标准，并以此为框架对《劳动合同法》展开解说和评价，以期得出对“《劳动合同法》的有效性如何”这一问题的回答并提出建设性的意见。

本文的研究框架总体分为两个部分：第一部分重点讨论法有效性的概

念和理论，在对法有效性的各种代表性观点进行梳理、分析和批判性理解的基础上，建立相对全面、科学地衡量法有效性的判断标准。第二部分重点讨论《劳动合同法》的有效性状况，以法有效性的一般标准作为分析框架，对《劳动合同法》进行系统地描述、解读和评价，在回答“《劳动合同法》的有效性如何”这一问题的基础上，对完善《劳动合同法》的实施提出建设性的意见。

以下就本文各章节的内容作简略叙述：

导论介绍了论文的研究背景与意义，所采用的主要研究方法，论文的结构安排以及相关概念使用上的必要说明。

第一章法的有效性释义。本章重点讨论了法的有效性的概念、理论和评价标准。作为现代社会调整人们行为模式的重要手段和方式，法的存在必须回答两个问题：第一，法为什么对其所指向的人们具有强制力和约束力？第二，法所具有的这种强制力和约束力在现实生活中的实际效果如何？对这两个问题的回答，也就是在回答法为什么有效？法以何种方式有效？法的有效性问题无疑是法哲学领域极富理论内涵与理论争议的基本问题之一，但是在法的有效性概念的理解和使用上却存在着诸多分化和歧义。在分析法的有效性的各种代表性观点的基础上，本文对法的有效性概念做出以下界定和理解：法的有效性是指法对其所指向的人们的强制力或约束力，以及法的功能和作用实现的程度和状态。法的有效性涉及两个层面，即法的效力层面的有效性和法的实效层面的有效性。在对西方法的有效性理论进行梳理和评述的基础上，确立了法的有效性评价标准，并对评价对象和评价内容进行了限定。本章最后在法的有效性评价标准的框架内，确立了《劳动合同法》有效性评价标准，包括《劳动合同法》的形式有效性、实质有效性和现实有效性三个方面，并以此作为后文的分析框架和理论基础。

第二、三、四章重点讨论《劳动合同法》的有效性状况，分别从《劳动合同法》的形式有效性、实质有效性和现实有效性等三个方面对其效力状况和实际效果进行分析、解读和评价。

第二章《劳动合同法》的形式有效性。本章是从法律效力的层面对《劳动合同法》有效性进行分析和评价。域外劳动合同法的形式渊源主要包括

以判例法为主、以法典为主和以单行法律为主的三种模式。在进行比较的基础之上，分析我国劳动合同法的形式渊源。我国劳动合同法的形式渊源包括宪法及其修正案、法律、行政法规、地方性法规和地方政府规章，以及司法适用中的其他规范性文件。从立法主体、立法权限和立法程序三个方面对《劳动合同法》的形式有效性状况进行分析，可以发现，《劳动合同法》的制定完全符合立法程序的要求，应当具备形式有效性。将《劳动合同法》作为社会法法律部门中调整劳动关系的法律规范之一进行考察，将其置身于一个更广的范围内做进一步分析时，可以发现，《劳动合同法》形式有效性受到影响。《劳动合同法》与其上位法《劳动法》之间存在立法依据不明等问题，与相关的规范性法律文件之间存在着法制不统一等问题。针对我国《劳动合同法》形式有效性的状况，提出对其进行完善的途径。

第三章《劳动合同法》的实质有效性。本章是从法的价值的层面对《劳动合同法》有效性进行分析和评价。《劳动合同法》的实质有效性是指调整劳动合同的法律规范的内容具有道德上的合理性，因其符合社会公认的道德标准而具有约束力。在法律实践中，当一部具体的法律所追求的价值与多数人共同确信的价值准则相吻合时，这部法律就具有实质有效性，也因此更容易被人们从内心所接受。本章首先确立《劳动合同法》实质有效性的判断标准，也就是对《劳动合同法》应然价值的选择和确立进行论证。认为《劳动合同法》的最高价值准则应当是人的全面发展和对人性尊严的应有尊重，其基本价值准则应当是效率、公平和人权（发言权）。然后对《劳动合同法》的实质有效性进行分析，通过对《劳动合同法》的立法宗旨和具体条款的价值评析，得出结论：我国《劳动合同法》在实质有效性方面，表现出重视公平价值、对效率价值的保护不足、在一定程度上体现劳动者的发言权的特征。同时也表明立法者的立法愿望和价值追求在法律制定的过程中有待于更正确地表达和更有效地实现。在此基础上，提出《劳动合同法》实质有效性的完善需要将价值取向的善意转化为合理地制度安排，要求立法者充分考虑到法律的普适性和可行性，做出正确的价值选择和价值平衡。《劳动合同法》实质有效性的实现需要完善立法中的利益表达机制、提高立法者的职业素养和改善法律实现的社会环境。

第四章《劳动合同法》的现实有效性。本章是从法的实效的层面对《劳动合同法》有效性进行分析和评价。《劳动合同法》的现实有效性意指《劳动合同法》在运行过程中能够实现它所达到的预期目标，产生它所意欲形成的效果，并且获得它所指向的人们的接受和遵守。本章在界定法的现实有效性内涵的基础上，确立法的现实有效性的评价标准，提出衡量一部法律的现实有效性状况，至少应当包括两个主要方面：一是法律实施对社会产生的影响，即法律在运行过程中是否能够实现它所达到的预期目标，产生了哪些效果；二是人们对法律实施的接受程度，考察人们观念上对待法律的态度。并从这两个方面对《劳动合同法》的现实有效性状况进行分析，指出《劳动合同法》现实有效性的制约因素。在此基础上，从提高立法质量、加大执法力度、增强法律意识和完善配套制度四个方面探讨提高我国《劳动合同法》现实有效性的途径。

结语对全文作出总结，从整体上对我国《劳动合同法》的有效性状况进行判断，回应了论文开篇所提出的问题。并在此基础上对《劳动合同法》有效性状况的原因以及提高、改进和完善的途径进行了简要分析。

关键词：法的有效性；形式有效性；实质有效性；现实有效性；劳动合同法

ABSTRACT

Labor relations is the most important kind of social relations in social production. To build and develop harmonious and stable labor relations is an important part of a harmonious society, which directly related to the stability of the whole community and process of economic development. Looking back 30 years after 1978, China has experienced a major change in transition from planned economy to market -oriented economy, which causing great changes in the field of labor relations. On the one hand, China is in the "golden development period", the economic level is sustaining high speed growth, create "China miracle" which Western economic theory can not explain and make the world filled with wonder of "Chinese efficiency"; on the other hand, the contradictions are prominent, in the field of labor relations, labor dispute cases are showing a rising trend, arrears of wages and mine disasters take place frequently, legal rights of workers are lack of institutional protection, the disharmony phenomenon and unstable factors are worrying, labor relations has been social problem of the most widespread concern. In this instance, to specify the rights and obligations of the parties to employment contracts, to protect the lawful rights and interests of employees, build and develop harmonious and stable employment relations, the *Labor Contract Law of the People's Republic of China* has been implemented since January 1, 2008.

The author has an interest in the disputes and phenomena causing by the *Labor Contract Law*. The process of debate, adoption, and implementation of the law has been highly controversial, is it good or evil? The implementation effect of the *Labor Contract Law* is far apart the intent of the legislator, and in real life encounter enormous challenges and questions. How to measure and evaluate its legal effects and impact roundly and objectively? All problems above mentioned, are about the validity and efficacy of the *Labor Contract Law*. In other words, that is, to answer the validity of the law. For the above thinking, the author attempts to sort the general theory and set measures of the validity of law, comment and evaluate the *Labor Contract Law*, to answer the question of the validity of law and put forward constructive suggestions.

The overall framework of this thesis is divided into two parts: The first part focuses on the concepts and theories of the validity of law, based on sort out, analysis and critical understanding to the various representative views of the validity of law, to establish measures of the validity of law comprehensively and scientifically. The second part focuses on the conditions of validity about the *Labor Contract Law*, takes the general standard of the validity of law as analytical framework, to describe, interpret and evaluate the *Labor Contract Law* systematically, and based on the answer to the validity of the *Labor Contract Law*, proposes constructive suggestions to improve it.

The following sections are the brief descriptions of this thesis:

Introduction introduces the background and significance of the thesis, the main research methods, the arrangement of structures, and the necessary instructions of related concepts.

Chapter 1 Interpretation of the Validity of Law

This chapter focuses on the concept, theory and evaluation criteria of the validity of law. As an important means and methods to adjusting the model of human behavior in modern society, the existence of law must answer two questions: First, why can the law force and bind people who it points to? And how does the actual effects of the law's force and binding in real life? Answer these two questions, that is, answer to why the law is effective? And which way is effective? No doubt the validity of law is one of the basic issues which are highly controversial and connotational in the field of philosophy of law. However, there are a lot of differentiation and ambiguity in understanding and using to the concept about the validity of law. On the basis of the analysis to the various representation of the validity of law, in this paper, make the following definition and understanding to the concept of the validity of law: The validity of law is the law can force and bind the people who directed by it, and the degree and condition which the function and effect of the law can achieve. The validity of law involves two aspects, the validity of law's effect and the validity of law's efficacy. Based on sorting out and reviewing to the validity of western law, establish the evaluation criteria of the validity of law, limit to the content and object of the evaluation. At last, establish the evaluation criteria of the validity of the *Labor Contract Law* including the formal validity, substantive validity and efficacy of the *Law* within the framework of the evaluation criteria

of the validity of law, later it would be the analytical framework and theoretical basis.

Chapters 2 to 4 focus on the conditions of the validity of the *Labor Contract Law*, analyze, interpret and evaluate the conditions of effectiveness and efficacy from the formal validity, substantive validity and efficacy of the *Labor Contract Law*.

Chapter 2 The Formal Validity of *Labor Contract Law*

It analyzes and evaluates the validity of *Labor Contract Law* on the formal validity of law. Based on analyzing and comparing the following models which the external laws on employment contracts manifest through case law, code and single law, to analyze the sources of *Labor Contract Law of the PRC*. It includes the Constitution and its amendments, laws, administrative regulations, local regulations and local government regulations, and judicial application of the other rules. As a preliminary analysis of formal validity of *Labor Contract Law* from legislative body, legislative authority and the legislative process, we would found that the *Labor Contract Law* should possess the formal validity of law in full compliance with the requirements of the legislative process. To inspect the *Labor Contract Law* as a department of social law which adjust labor relations, and analyze it in a wider range, we would found that the formal validity of *Labor Contract Law* can be affected. The legislative basis is ambiguous between the *Labor Contract Law* and the *Labor Law*, the legal system among the *Labor Contract Law* and the relevant local laws and regulations, local government regulations and the other rules within judicial practice is not uniform. Based on this situation, it put forward a way to improve the formal validity of *Labor Contract Law*.

Chapter 3 The Substantive Validity of *Labor Contract Law*

It analyzes and evaluates the validity of the *Labor Contract Law* on the value of law. The substantive validity of *Labor Contract Law* means the content of legal norms which adjusts labor contract possesses moral rationality, since it measures up ethical standards recognized by the community and possesses binding effect. In legal practice, when the value pursuit by a specific legal coincides the majority of people believe, the legal would possess the efficacy, and therefore more easily accepted by people from heart. Firstly this chapter would establish the criterion for judgment of substantive validity. The

guidelines of maximum value for *Labor Contract Law* should be human develop comprehensively and human dignity should be respected. The basic value disciplines of the law should be efficient, fair and intensify protection of human right (right to speak). Then it would analyze the substantive validity of *Labor Contract Law*. Through evaluating and analyzing the purpose of legislation and the specific terms, concluded that, *Labor Contract Law* of the PRC shows the great importance to the fair value, insufficient protection for the value of efficiency, and reflect the rights of speak for workers to a certain extent. It also shows the legislative desire and value seeking of legislator is up for expressing more accurately and achieving more effectively on law-making process. On this basis, to improve the substantive validity of *Labor Contract Law* need to convert the goodwill for value orientation into reasonable arrangement, it requires that the legislators should take full account of the universality and feasibility of law, and then making right value option and balance. The improvement for the substantive validity of *Labor Contract Law* depends on the following aspects: improving expression mechanism of interest in legislation, enhancing the professional level of legislators, and improving the social environment for legal realisation.

Chapter 4 The Efficacy Validity of *Labor Contract Law*

The forth chapter analyzes and evaluates the validity of the *Labor Contract Law* on the efficacy of law. The realistic validity of *Labor Contract Law* means the law can achieve its target in the running process, result its intended effect, and be accepted and complied by the people who were pointed by it. Based on defining the content of the realistic validity of law, this chapter would establish the criteria for measuring, and then conclude that there are two major aspects at least to measure the realistic validity of law: First, the implementation of law impacts the society, that is, whether the law can achieve its target in the running process and what effect it results in; second, to investigate people's attitudes to the law. By analyzing the realistic validity of *Labor Contract Law* from over two aspects, it would point out the constraints for the realistic validity of the law. On this basis, it would discuss the way to improve the efficacy validity of *Labor Contract Law* from improving the quality of legislation, strengthening law enforcement, enhancing the legal awareness and supporting system.

The conclusion summarize the full text by judging the validity situation of

the *Labor Contract Law* entirely, responds to the questions raised at beginning of the thesis, analyzes the reasons for the validity situation of *Labor Contract Law* and the way for improvement.

Key Words: Validity of Law; Formal Validity; Substantive Validity;
Efficacy Validity; *Labor Contract Law*.

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